



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
HIGH COURT CR. CASE NO.4 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

GILBERT KIPNG'ENO TONU.....ACCUSED

RULING

1. **GILBERT KIPNG'ENO TONU** hereinafter referred to as the Accused/Applicant is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The murder is said to have occurred on 7th February 2016.
2. He was first arraigned in court on 15th February, 2016. His plea was taken on 16th February 2016 before the High Court at Kericho.
3. Mr. Orina later filed an application for bond/bail dated 18th February, 2016. It was brought under Articles 23 and 49 of the Constitution.

Article 49 (1) (h) provides:

“ 49. (1) An arrested person has the right-

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

4. The application is supported by the grounds on the face of the application which are:
 - i. **That the applicant is charged with an offence of murder and he returned a plea of not guilty.**
 - ii. **That the offence the applicant is charged with is bailable under the laws of Kenya.**
 - iii. **That the applicant is innocent and the law presumes him so until proven otherwise.**
 - iv. **That the matter has not been listed for hearing and there is a likelihood that the date may be too far and the accused may be remanded long which is tantamount to serving sentence.**

v. **That the accused seeks the protection of his fundamental rights.**

vi. **That it is in the interest of justice that the application be allowed and orders sought be granted.**

4. It is also supported by the applicant's sworn affidavit. At paragraph 6 of the said affidavit, he depones as follows:

“That I am an inspector at the CID Headquarters in Nairobi and I am willing and ready to provide a surety and deposit security in court if the court grants and releases me on bond. Annexed herewith and marked “GKT 1 a & b” are copies of staff identification and certificate of appointment from the National Police Service.”

5. Police Constable John Wambua F/No.40856, the Investigating Officer filed a replying affidavit sworn on 19th February 2015. He states that there is a lot of tension on the ground and the accused/applicant's life would be in danger if he was released on bond. Further that as a result of what had happened the deceased's grandmother died from shock. There was therefore fear that the accused may interfere with witnesses by virtue of the office that he holds.

6. That the said offence involved the applicant and his two brothers who are at large. The offence occurred as a result of a boundary dispute between the accused and the deceased.

7. When the application came for hearing both counsel for the State and defence made submissions based on the affidavits filed. Mr. Orina for the Accused/Applicant submitted that the interference mentioned by the State had not been explained.

8. This court called for pre-bond report which was filed on 7th March 2016. I have read the report which shows that there is still tension in the village where the incident took place. The accused's wife and children have had to relocate to their original home. It talks of villagers vowing to take revenge.

9. There is no dispute that bail/bond is a Constitutional right to every offender in spite of the offence committed. The only inhibition is when there are compelling reasons that make it impossible for release of the accused person. In the instant case the prosecution has opposed the release of the Accused/Applicant on bond. It is therefore its duty to prove to this court the compelling reasons making it oppose bond.

10. I have considered the application, affidavits, prebond report and the submissions. The grounds raised by the prosecution for opposing bond are:

- i. **Tension on the ground.**
- ii. **Two accomplices being at large.**
- iii. **Interference with witnesses.**

11. **Tension on the ground:**

When a person dies as a result of un natural means or is killed, the people close to him/her feel a lot of emotional pain. That is the reason why the matter is reported to the relevant authority for purposes of investigations and probable arraignment of the culprit in court. The suspect is before this court and there are processes to be adhered to before the hearing starts and a verdict is arrived at. In spite of the emotional pain that the deceased's family is undergoing, it would not be proper for them to use that as a ground to engage in lawlessness. The threats by the deceased's relatives to take revenge, if the accused is released on bond are criminal and a subversion of justice and should not be entertained at all.

12. **Two accomplices being at large:**

It has been alleged that there are two suspects connected with this offence, who are at large. It was the

duty of the prosecution to show that, the Accused/Applicant is responsible for their disappearance, and/or is aware and/or has information on their whereabouts. In other words is the prosecution saying that unless and until the missing suspects are arrested the Accused/Applicant should never be released on bond? Would that not be going against the tenets of the very Constitution we are supposed to protect?

13. Interference with witnesses:

At paragraph 7 of his replying affidavit of Police Constable John Wambua states:

“That the Applicant is an inspector of police in the Directorate of Criminal Investigation and there is likelihood of him interfering with witnesses should he be released on bond.”

It is true that the Accused/Applicant could use his position to interfere with witnesses whether on bond or in custody. It is now one and a quarter (1 ¼) months since the killing of the deceased. The police should be through with their investigations.

14. There is no evidence tendered before this court showing that the Accused/Applicant has interfered with any witnesses. Further, it is not indicated the kind of witnesses he is likely to interfere with. It is not for this court to start guessing who these witnesses are.

15. The law presumes an accused person to be innocent until proved guilty. Such a person has a right to bond unless there are compelling reasons for denial of such a right. One of the commitments an accused person makes when released on bond is to appear before court whenever required by the said court.

16. The prosecution has not indicated anywhere showing that the Accused/Applicant is a flight risk. I am therefore unable to find any compelling reason that would make this court deny the Accused/Applicant his right to bail/bond.

17. The Accused/Applicant will now be released upon executing a bond of Ksh.500,000/- with a surety in similar sum and on the following condition:

- To keep off the Jerusalem village of Sotik District until this matter is heard and determined or if the two families reconcile.

Signed, dated and delivered this 14th day of March, 2016.

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H. I. ONG'UDI

JUDGE